(3)

No. 91-1433

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREAT WESTERN COAL (KENTUCKY), INC. and GREAT WESTERN COAL INC.,
Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY and KENNETH R. FORD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONERS' REPLY MEMORANDUM

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
JUDITH A. MILLER
VICTORIA L. RADD
JOHN D. CLINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

TIMOTHY J. HARRIS
CHARLSTON, REVICH & WILLIAMS
2049 Century Park East
Forty-Second Floor
Los Angeles, CA 90067
(310) 551-7000
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Burke v. *Barnes*, 479 U.S. 361 (1987)	8
Chicot County v. *Sherwood*, 148 U.S. 529 (1893)	5
Cowles v. *Mercer County*, 74 U.S. (7 Wall.) 118 (1869)	2, 3, 4
Creech v. *SCPSA*, 20 S.E.2d 645 (S.C. 1942)	3
Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)	2
Haring v. *Prosise*, 462 U.S. 306 (1983)	7
Indiana Port Commission v. *Bethlehem Steel Corp.*, 702 F.2d 107 (7th Cir. 1983)	6, 7
Lee v. *Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 470 U.S. 753 (1985)	7
Lowe v. *Lowe*, 182 S.E.2d 75 (S.C. 1971)	7
Migra v. *Warren City School District Board of Education*, 465 U.S. 75 (1984)	7
Moor v. *County of Alameda*, 411 U.S. 693 (1973)	2-7
Rice Hope Plantation v. *SCPSA*, 59 S.E.2d 132 (S.C. 1950)	3
SCPSA v. *Citizens & Southern National Bank*, 386 S.E.2d 775 (S.C. 1989)	3
State Highway Commission of Wyoming v. *Utah Construction Co.*, 278 U.S. 194 (1929)	3, 4
Tradigrain v. *Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983)	6, 7
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)	8
Utah Construction Co. v. *State Highway Commission of Wyoming*, 23 F.2d 638 (8th Cir. 1927), *rev'd*, 278 U.S. 194 (1929)	3

Statutory Provisions	
28 U.S.C. § 1738	7
S.C. Code Ann. § 58-31-10	3, 4
S.C. Code Ann. § 58-31-30	4, 5
S.C. Code Ann. § 58-31-30(2)	5
S.C. Code Ann. § 58-31-30(4)	5
S.C. Code Ann. § 58-31-30(17)	4
S.C. Code Ann. § 58-31-50	5
S.C. Code Ann. § 58-31-110	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1433

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL INC.,
Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
and KENNETH R. FORD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONERS' REPLY MEMORANDUM

---

1. Santee Cooper's Opposition [1] effectively concedes Great Western's principal point: the federal courts have developed no clear standard for determining whether a state-owned corporation is a "citizen" of a "State" for diversity purposes. As Santee Cooper appears to acknowledge, Opp. 12, the courts engage in an *ad hoc* balancing of various "factors" that they consider relevant to the issue—a balancing that frequently (as in this case) smacks of an after-the-fact attempt to justify the court's result.

---

[1] Santee Cooper's Brief in Opposition to Petition for a Writ of Certiorari will be cited as "Opp." Great Western's petition will be cited as "Pet." The Appendix that accompanies the petition will be cited as "App."

2. As Great Western demonstrated in its petition, Pet. 6-8, this Court's decisions in *Cowles* v. *Mercer County*, 74 U.S. (7 Wall.) 118 (1869), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), provide guidance on the citizenship issue. *Cowles*—reaffirmed in *Moor*—concluded that a separately incorporated entity with the power to enter into contracts had sufficient independence from the state to be a "citizen." Such a bright-line standard—if reaffirmed by this Court—would bring much-needed clarity and simplicity to a muddled area of federal jurisdiction.[2] Such a clear standard would avoid the extensive jurisdictional briefing and argument and the lengthy fact-bound opinions that frequently result from the standardless approach that the courts now use.

3. *Moor* set forth ten factors which confirmed its conclusion that Alameda County was a "citizen." Pet. 8-11 (discussing *Moor* factors). If further refinement beyond the *Cowles* standard is needed, the *Moor* factors provide it. The lower courts in this case ignored both Santee Cooper's separate corporate status and corporate powers (found determinative in *Cowles*) and the other factors that the Court examined in *Moor*.

4. Santee Cooper insists that "[t]his case and *Moor* concern different rules" because *Moor* involved a "local governmental unit[]" while this case involves a "state agency

---

[2] The *Cowles* and *Moor* standard may be "more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (describing Justice Holmes' test for federal question jurisdiction). Thus, an entity that is separately incorporated with corporate powers is a "citizen" of a "State" for diversity purposes under *Moor* and *Cowles*. An entity that is not separately incorporated, or that does not have corporate powers, might still be a "citizen" (rather than an "arm" or an "*alter ego*" of the state) if it has other indicia of independence.

acting as an arm of the State." Opp. 13.[3] But there is no suggestion in *Moor* of this distinction. Nor does Santee Cooper explain what difference such a distinction would make if it existed. Whether an entity is labeled a "state agency" or "a local governmental unit," the inquiry for diversity purposes is precisely the same: whether the entity is so closely associated with the state as to be "simply 'the arm or *alter ego* of the State.' " *Moor*, 411 U.S. at 717 (applying "arm or *alter ego*" test to county) (quoting *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U.S. 194, 199 (1929) (applying identical test to state highway commission)).

5. Contrary to Santee Cooper's suggestion (Opp. 14), *Cowles* and *Moor* on one hand and *Utah Construction Co.* on the other do not employ different modes of analysis for different kinds of entities. Those cases establish a single standard applicable to all entities. Their results are entirely consistent in light of the nature of the entity at issue in each case. The entity in *Utah Construction Co.*—the Wyoming State Highway Commission—was not separately incorporated. *Utah Construction Co.* v. *State Highway Commission of Wyoming*, 23 F.2d 638, 644 (8th Cir. 1927) (Scott, J., dissenting) (statute creating Commission "does not purport to create a corporation, but in my opinion a mere commission to which is committed the execution of particularly described duties"), *rev'd*, 278 U.S. 194 (1929); *see* 278 U.S. at 196-97 (describing Commission's governing statutes). The contracts on which the claims in that case rested were entered into by " 'the state of

---

[3] Even if this purported distinction were significant, it is far from clear that Santee Cooper would fall into the "state agency" category. Santee Cooper's governing statute expressly recognizes it as a "body corporate *and politic*," S.C. Code Ann. § 58-31-10 (emphasis added), much like a county or other "local governmental unit." Similarly, the courts of South Carolina have repeatedly characterized Santee Cooper as a "quasi-municipal corporation." *SCPSA* v. *Citizens & Southern National Bank*, 386 S.E.2d 775, 786 (S.C. 1989); *Rice Hope Plantation* v. *SCPSA*, 59 S.E.2d 132, 138 (S.C. 1950); *Creech* v. *SCPSA*, 20 S.E.2d 645, 648 (S.C. 1942).

Wyoming, acting through the state highway commission.'" *Id.* at 197 (quoting contract). Thus, "[t]he state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the commission nor any of its members assumed any direct or personal responsibility." *Id.* at 199.

6. In *Cowles* and *Moor*, by contrast—as in this case—the entities at issue were separately incorporated. They had the power to enter into contracts in their own name, and they had other corporate powers as well. Thus, *Utah Construction Co.* on one hand and *Cowles* and *Moor* on the other represent straightforward applications of the same principle: an entity that is separately incorporated with corporate powers is *not* a mere "arm or *alter ego* of the State." An entity that is not separately incorporated (and that does not have corporate powers) *may be* an "arm or *alter ego* of the State." The district court and the court of appeals below ignored the principle reflected in these cases.

7. Santee Cooper does not (and could not) dispute that it is separately incorporated and that it has corporate powers, including the power to enter into contracts.[4] Nor does it dispute that the ten *Moor* factors weigh overwhelmingly against its claim that it is a mere arm of the state. The only *Moor* factor on which Santee Cooper directly contests Great Western's characterization is the

[4] *See* S.C. Code Ann. §§ 58-31-10 ("body corporate and politic"), -30 (corporate powers), -110 (Santee Cooper "is a corporation"); *id.* § 58-31-30(17) (Santee Cooper has the power to "make contracts of every name and nature"). Santee Cooper asserts that it "is not a private corporation nor analogous to one" and that it is "subject to none of the registration requirements applicable to domestic corporations in South Carolina." Opp. 4 n.4. These observations, whether or not accurate, miss the point: by separately incorporating Santee Cooper and giving it extensive corporate powers, the South Carolina legislature clearly intended to give it an existence separate from the State of South Carolina.

third—its essentially local character. Opp. 7-9 & n.10.[5] But Santee Cooper's own discussion of this issue—which largely ignores the explicit statutory limits on its authority—underscores the fact that its activities extend only to certain portions of the state.[6]

8. The ten factors that the Court examined in *Moor* are not merely "factors that were especially relevant in the context of that particular case," as Santee Cooper insists. Opp. 15. Rather, the factors that the Court considered—including, for example, the entity's separate corporate status, its power to sue and be sued, its power to enter into contracts, its power to acquire and sell prop-

---

[5] Santee Cooper's contention that Great Western "conceded that [Santee Cooper's] responsibilities are state-wide" in the district court (Opp. 7) is wrong. Great Western made no such concession, and the portions of the record cited in the Opposition do not reflect one. The question of Santee Cooper's local or state-wide character was hotly disputed and thoroughly briefed in the court of appeals, and Santee Cooper never contended there that Great Western had "conceded" the issue.

[6] Santee Cooper briefly addresses two other *Moor* factors—its power to acquire and dispose of assets, and its power to sue and be sued. Opp. 15 n.12. The "substantial limits" that Santee Cooper purports to find on its power to acquire and dispose are minor indeed; they consist solely of a restriction on the power of the board of directors to sell *all* of Santee Cooper's physical property, S.C. Code Ann. § 58-31-30, and an approval requirement for purchases of property without condemnation from private corporations, *id.* § 58-31-50. These provisions impinge only slightly on Santee Cooper's broad power "[t]o acquire, purchase, hold, use, lease, mortgage, sell, transfer, and dispose of any property, real, personal or mixed, or any interest therein." *Id.* § 58-31-30(4).

Santee Cooper also insists that its power "[t]o sue and be sued," *id.* § 58-31-30(2), is limited by the South Carolina Tort Claims Act. Opp. 15 n.12. But the restrictions the SCTCA imposes on Santee Cooper's liability to suit have little, if any, bearing on its status as a "citizen." *See Chicot County* v. *Sherwood*, 148 U.S. 529, 533-34 (1893) (state legislature cannot eliminate federal jurisdiction by providing that county can be sued only in local courts).

erty, and its liability for judgments against it, *see* 411 U.S. at 719-20—are generally applicable to determining whether *any* entity is an arm or an *alter ego* of the state. Santee Cooper does not even try to explain why these factors are not as determinative in this case as they were in *Moor*.

9. Santee Cooper insists that the cases Great Western cited at Pet. 12-13 to illustrate the confusion in the lower courts merely "reached different results on different facts." Opp. 16. But these courts looked to different *factors*, rather than to different *facts*, and they did so without explanation. The two cases that Santee Cooper compares (Opp. 17) illustrate this point. In *Tradigrain* v. *Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), the court held the state port authority to be an arm of the state because of various statutory limitations on its powers. *See id.* at 1133. The court assigned little weight to the authority's corporate purposes and powers, including the power to sue and be sued, to enter into contracts, and to purchase, lease, and own property. *See id.* at 1133; *see also id.* at 1136-37 (Thornberry, J., dissenting) (weighing factors differently).

10. By contrast, in *Indiana Port Commission* v. *Bethlehem Steel Corp.*, 702 F.2d 107 (7th Cir. 1983), the court held the state port commission not to be an arm of the state because it was "an independent corporate entity seeking to assert its own rights in this action." *Id.* at 110. The court examined no other factors and conducted no further analysis.

11. Santee Cooper purports to harmonize these cases on the ground that both courts "looked to state law" to determine the entities' status. Opp. 17. But the role of state law in these and other federal cases presenting the "arm or *alter ego*" issue is more circumscribed than Santee Cooper suggests. As *Moor* makes clear, the choice of factors that the federal court will consider in determining whether an entity is a "citizen[]" (and the

weight to be accorded those factors) is a matter of *federal* law. State law serves only to determine which way the factors point in a particular case—for example, whether an entity (such as the County of Alameda in *Moor*) is separately incorporated and whether it has the power to enter into contracts.

12. *Tradigrain*, *Indiana Port Commission*, and the other cases cited in the petition are irreconcilable not because of differences in *state* law, but because the courts in those cases chose as a matter of *federal* law to give weight to different factors. It is this unprincipled selection and weighing of factors—exemplified by the decisions of the lower courts in this case—that this Court should correct.

13. Santee Cooper's claim of mootness (Opp. 10) is flatly wrong. Santee Cooper appears to argue that the decision of the state trial court rejecting Great Western's motion to compel arbitration bars Great Western's federal action under the Full Faith and Credit Act, 28 U.S.C. § 1738. The Full Faith and Credit issue was vigorously contested in the court of appeals. Great Western argued both as a matter of South Carolina law [7] and as a matter of due process [8] that the state court ruling was not en-

---

[7] Under § 1738, a federal court must accord a state court judgment the same preclusive effect that it would receive in the state court where it was rendered. *See, e.g., Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984). South Carolina law does not accord preclusive effect to an order pending appeal *See Lowe* v. *Lowe*, 182 S.E.2d 75, 77 (S.C. 1971) ("Affirmance of the order of the lower court on this issue [alimony] would make *res judicata* the alimony issue."). As Santee Cooper acknowledges, Opp. 6 n.6, Great Western's appeal from the trial court's order refusing arbitration has been briefed before the South Carolina Supreme Court but has not yet been argued or decided. Under state law, therefore, the order is not entitled to preclusive effect.

[8] A federal court need not accord preclusive effect to a state court ruling if the state court ruling does not accord with due process. *See, e.g., Haring* v. *Prosise*, 462 U.S. 306, 313 (1983); *Lee*

titled to preclusive effect. The court of appeals did not reach these issues. This Court should grant certiorari, reverse the court of appeals' jurisdictional ruling, and remand for consideration of the Full Faith and Credit issue and the other issues in the case.

14. If the Court were to agree with Santee Cooper that the case is moot, the appropriate course would not be to deny the petition, as Santee Cooper contends. Rather, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see, e.g., Burke* v. *Barnes*, 479 U.S. 361, 365 (1987).

---

v. *Winston*, 717 F.2d 888, 895 (4th Cir. 1983), *aff'd on other grounds*, 470 U.S. 753 (1985). Great Western argued in the court of appeals that the order of the South Carolina trial court denied due process in two respects. First, there was no record evidence to support the state trial court's ruling that the arbitration clauses in the two coal contracts were unenforceable because of "fraud in the factum." Second, the state trial court denied Great Western the opportunity to confront and cross-examine the witness whose affidavit Santee Cooper presented to the state trial court and on which that court exclusively relied.

CONCLUSION

For the reasons stated above and in Great Western's petition, certiorari should be granted.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
JUDITH A. MILLER
VICTORIA L. RADD
JOHN D. CLINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

TIMOTHY J. HARRIS
CHARLSTON, REVICH & WILLIAMS
2049 Century Park East
Forty-Second Floor
Los Angeles, CA 90067
(310) 551-7000

Counsel for Petitioners